Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 02-626

In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT FRIENDS OF THE EVERGLADES

John E. Childe
606 Pine Road
Palmyra, Pa. 17078
(717) 520-1510

Counsel for Respondent

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

BEST AVAILABLE COPY

QUESTION

Certiorari has been granted in this case on the issue "whether the pumping of water by a State water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act."

TABLE OF CONTENTS

Page

Question i

Table of Authorities ii

Introduction 1

Statement of Relevant Facts 1

Summary of Argument 9

Argument 15

Grant of Certiorari 15

Point Source Does Not Have To Generate Pollutants ..15

The Natural Everglades and the State of Florida Water Management System Known as the C&SF Project Are Not One Single Water Body 18

Discharges from One Body of Water to Another Are Not Exempted under the Definition of Point Source 23

The Dam Exemption 27

Outside Source Means Any Place Outside the Particular Water Body to which Pollutants Are Introduced 29

The Discharge from the S-9 Pump Station into the Everglades Is Not a Nonpoint Source Flow Diversion Facility under Section 304(f)(2)(F) 32

The Structure of the CWA Point and Nonpoint Source Control: Balance Between Federal and State Responsibilities 35

The Eleventh Circuit Decision Facilitates the Traditional Federal-State Balance of Powers 38

S-9 Permit under the Everglades Forever Act 39

Florida's Nonpoint Source Program for the Everglades Has Been Ineffective and Driven by Lawsuits for Failure to Implement a Sound Restoration 42

Section 402 Is Not Limited to Permitting Industrial and Municipal Waste Streams 44

The Solicitor General's Brief 45

Impact of the Eleventh Circuit Decision 47

Conclusion 48

TABLE OF AUTHORITIES

CASES: Page

Alabama Rivers Alliance v. *Federal Energy Regulatory Commission*, 325 F.3d 290 (D.C.Cir.2003) 24

Catskill Mountains Chapter of Trout Unlimited, Inc. v. *City of New York*, 273 F.3d 481 (2nd Cir.2000) 14, 29, 30

Consumer Product Safety Comm'n v.*GTE Sylvania, Inc.*, 447 U.S. 102 (1980).....23

Dague v. *City of Burlington*, 935 F.2d 1343 (2nd Cir.1991), rev'd in part on other grounds, 505 U.S. 557 (1992).....30

DuBois v. *U.S. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir.1996) 30

E.I. DuPont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 30

EPA v. *California ex.rel. State Water Resources Control Board*, 426 U.S. 200 (1976) 25, 26, 39, 41

Hodel v. *Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264 (1981) 35

Miccosukee Tribe et al. v. *SFWMD*, 289 F.3d 1364 (11th Cir.2002).....9

Miccosukee Tribe v. *United States*, 1998 WL 1805539. ... 44

Milwaukee v. *Illinois*, 451 U.S. 304 (1981).....12, 14, 24, 45

CASES—Continued: Page

National Wildlife Fed'n v. *Consumer Power*, 862 F.2d 580 (6th Cir.1988).....13, 27, 28, 29, 38

National Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156 (DC Cir.1982) 13, 17, 27, 28, 46

Northern Plains Resource Council v. *Fidelty Exploration and Development Co.*, 325 F.3d 1155 (9th Cir.2003).....30

PUD No. 1 of Jefferson County et.al. v. *Washington Department of Ecology et al.*, 511 U.S.700 (1994).....37

Robinson v. *Shell Oil Co.*, 519 U.S. 337 (1997).....23

Rybachek v. *U.S. EPA*, 904 F.2d 1276 (9th Cir.1990)....29, 31

United States v. *Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir.1979).....31, 33, 24

United States v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501 (11th Cir.1985), vacated on other grounds, 481 U.S. 1034(1987), readopted in relevant part, 848 F.2d 1133 (11th Cir.1988).....29

United States v. *South Florida Water Magmt. Dist.*, 847 F.Supp. 1567 (S.D. Fla.1992),aff'd and rev'd in part, 28 F.3d 1563 (11th Cir.1994), cert denied, 514 U.S. 1107 (1995) 42

STATUTES AND REGULATIONS:

Federal Clean Water Act
§ 101(a), 33 U.S.C.§ 1251(a).....12, 16, 23, 35, 46

STATUTES AND REGULATIONS – Continued Page

§ 101(a)(1), 33 § U.S.C. 1251(a)(1).....16, 23, 35
§ 101(a)(2), 33 § U.S.C. 1251(a)(2)..... 25
§ 101(b), 33 U.S.C. §1251(b).....36
§ 101(g), 33 U.S.C. §1251(g).....37, 38
§ 301, 33 U.S.C. §1311 .....1, 9, 13, 14, 16, 26, 41, 47
§ 301(a), 33 U.S.C. §1311(a)..... 9, 12, 23, 28, 33, 35
§ 301(b)(1)(C), 33 U.S.C.§ 1311(b)(1)(C).....36
§ 301(e), 33 U.S.C. §1311(e).....39
§ 302, 33 U.S.C. §1312.....39
§ 303, 33 U.S.C. §1313 .....19, 36, 39
§ 303(a), 33 U.S.C. §1313(a).....27, 36
§ 303(c)(2)(A), 33 U.S.C. §1313(C)(2)(A).....27, 46
§ 303(d), 33 U.S.C.§ 1313(d).....28, 38
§ 303(d)(4)(b), 33 U.S.C.§ 1313(d)(4)(b).....27
§ 304(f)(2)(F), 33 U.S.C. §1314(f)(2)(F).....11, 14, 32, 33, 34, 46
§ 309, 33 U.S.C. §1319.....41
§ 309(a), 33 U.S.C. §1319(a).....36
§ 401, 33 U.S.C. §1341 36
§ 401(a)(1), 33 U.S.C.§1341(a)(1).....24
§ 402, 33 U.S.C.§1342 .....1, 9, 14, 16, 18, 22, 23, 25, 26 28, 30, 33, 35, 38, 41, 44, 45, 46, 47
§ 402(b), 33 U.S.C. §1342(b)..... 35
§ 402(c), 33 U.S.C. §1342(c)..... 35
§ 404, 33 U.S.C. §1344.....34, 38
§ 502(6), 33 U.S.C. §1362(6)..... 13, 14, 16, 17, 26, 41, 44 46, 47, 49
§ 502(12), 33 U.S.C. §1362(12).....9, 10, 12, 15, 22, 23, 47
§ 502(14), 33 U.S.C. §1362(14).....10, 12, 16, 17 33, 36, 42, 44, 46, 47
§ 505, 33 U.S.C. §1365.....41
§ 510, 33 U.S.C. §1370.....36
§ 510(2), 33. U.S.C. §1370(2).....37

40 C.F.R.:
Section 122.....35

STATUTES AND REGULATIONS –Continued Page

Section 122.2.....34
Section 1.22.4(a), (d) 39
Section 131.12.....36
Section 131.4(a)(1993) 36

S. Rep. No. 92-414(1091) 17, 24, 25

Water Pollution Control P.L. 92-500 Legislative History 2 U.S.C.C.A.N. p.3742-3743 (1972) 17

FLORIDA STATUTES AND REGULATIONS:

C & S F Project for Flood Control and Other Purposes, 1948, P.L.858, §203. 62 Stat.1176.....3, 11

Comprehensive Everglades Restoration Project, 114 Stat 2681, §601(b)(2)(A)(II)(ii) 47

Water Resources Development Act of 1996, Pub.L.No.104-303,110 Stat. 3658:
§528(b).....40

Water Resources Development Act of 2000, Pub.L.No. 106-541, §601(b)(2)(C)(v), ...40, 47

Fla. Laws ch. 91-80.....43
Fla. Stat. Ch. 298 .....5, 11
Fla.Stat.Ann.(West Supp.2003):
§373.016.....42
§373.1501 42
§373.451- 373.4595 5
§373.403(10).....2, 11, 19, 20
§373.413, Rule 40E.....5
§373.4592 (1991) Marjory Stoneman Douglas Everglades Protection Act of 1991 .....2, 19, 22, 43

FORIDA STATUTES AND REGULATIONS –Cont'd Page

§373.4592 (1992).....5
§373.4592 (1994) Everglades Forever Act of 1994 .....2, 22, 44
§373.4592 (3)(e) (2003).....44, 47
§373.4592(1)(g) 39
§373.4592(2)(e) 19
§373.4592(2)(h) 19
§373.4592(4)(a) 40, 43
§373.4592(4)(f)(3) 43, 44
§373.4592(9)(k),(i) 39
§373.4592(10).....39
§403.088.....35

FLORIDA ADMINISTRATIVE CODE:

17- 43.035 5
62.302.300(13).....7
62-302.400 .....19, 36
62-302.500(e).....7, 32
62-302.700 24
62-302.700(1),(2).....19

OTHER AUTHORITIES:

Bechtel and Hill, *Analysis of Historical Water Quality Data for Non-ECP Structure S-9.* Jan 31, 1996, - revised February 9, 1996.....6, 7
Burns & McDonnell, Everglades Protection Project Conceptual Design ES-2 (1994) 43
C&SF Flood Control Act, §203, 62 Stat 1176, P.L. 858 80 Cong. 2nd Sess. 11
CERP Restudy, 1999.....3, 20, 40

OTHER AUTHORITIES—Continued Page

Committee Print compiled for Committee on Environment and Public Works by the Library of Congress SER. No. 95-14(1978).....37
Comprehensive Everglades Restoration Plan: Master Program Management Plan, vol.1, 2000 Management Processes 24
Consolidated Report, 2003 Everglades Forever Act 11, 19 20, 39, 40
DeGrove, Central and South Florida Flood Control Project 1958 42
Frank, 35 Santa Clara Law Review 1269, 1287-8 (1995)....36
Hobbs and Raley, *Water Rights Protection and Water Quality Law* University of Colorado Law Review, vol. 60, 1989 38
HR Doc. 643 (1948) Establishment of Central & South Florida Project.....2, 3, 4, 5, 21, 27, 28
Southwest Broward County Study, 1982 8
Surface Water Improvement and Management (SWIM) Plan, Planning Document, March 13, (1992).....4, 5, 7, 8, 20, 42
U.S. Army Corps of Engineers, C&SF Comprehensive Review Study (1999) 9
Webster's New Century Dictionary, 2001 Ed.....10, 24

INTRODUCTION

The Friends of the Everglades [1]("The Friends") and the Miccosukee Tribe of Indians ("The Tribe") each brought a separate suit against the South Florida Water Management District ("SFWMD"; or, "the Water Management District") to the Federal District Court for the Southern District of Florida (cases #98-6056 & 98-6057), which alleged that the District was violating the Federal Clean Water Act, ("CWA"), §301; 33 U.S.C.§1311, by discharging pollutants from the C-11 Canal in Broward County, Florida, west through the S-9 Pump Station into the Everglades area known as Water Conservation Area 3-A, ("WCA-3A"), without a National Pollutant Discharge Elimination System ("NPDES") permit under §402 of the CWA, 33 U.S.C.§1342. The Federal District Court denied the District's motions for summary judgment against the two Plaintiffs, and granted summary judgment in favor of the Plaintiffs against the District. On appeal the Eleventh Circuit Court upheld the District Court decision, published at 280 F.3d 1364.

STATEMENT OF RELEVANT FACTS

This Case is about whether an NPDES permit under the CWA is required for the discharge of pollutants from a stormwater management system[2] called the C-11 Basin into

---

[1] Friends of the Everglades was founded by Marjory Stoneman Douglas, author of the book "The Everglades: River of Grass," recipient of the Presidential Medal of Freedom, and leading figure in establishing the Everglades National Park. There are over 6000 members whose interests are in protecting and restoring the Everglades.

[2] Stormwater management system is defined by Florida statute as "a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental

an area of the Everglades ecosystem identified as Water Conservation Area-3A (WCA-3A).

The Everglades ecological system is unique in the world. It is considered one of Florida's and the Nation's great treasures. Marjory Stoneman Douglas Everglades Protection Act. Fla. Stat. §373.4592, ¶1(a) (1991); Everglades Forever Act Fla. Stat. §373.4592 (1994).

In 1948, the Florida legislature described the historic Everglades:

> In its original state the region now known as the Everglades was a vast solitude of sawgrass and water and was aptly termed by its Indian inhabitants the 'Pa-hay-okee', or 'grassy water'. Under natural conditions the waters of Lake Okeechobee would rise over the southern rim of the lake...Everglades and flow slowly through the grass and other vegetation **to escape eastward through a few small rivers which flowed through the east-coast barrier ridge,** or to pass eventually to the sea through the marshes and tangled mangrove thickets which mark the southern tip of the Florida Peninsula.
>
> HR.Doc. 643 ¶ 13, (1948). (Estab. of C&SF Flood Control Project, which was adopted by Congress 1949.) (Emphasis added).[3]

> The **coastal ridge** which Forms the eastern border of the Everglades is a strip of sandy land varying from 5 to 10 miles in width. **It is in general a highly developed urban and a cultural area....**In the coastal and southern areas, waters collecting over the Everglades spread eastward as well as southward, to inundate low urban areas in and adjacent to West Palm Beach, Fort Lauderdale, and Miami.
>
> HRDoc.643 ¶ 17, 34.

---

degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system." Fla. Stat. 373.403(10).

[3] Only partially cited in P.B. 6. What is now the C-11 Canal was at one time the South New River. In the early 1900's, the South New River Canal, now known as the C-11 Canal, was dug to drain to the east the area of Broward County located in the Everglades. J.A. 175. Just north, along the northern border of Broward County, is the North New River, now also a canal. See J.A. Map Exhibit 9.

The Everglades ecosystem that once ran freely from Lake Okeechobee to the south and east through natural rivers to the coast has been altered radically. In 1947, a major flood occurred from the Everglades inundating southeastern populated areas from West Palm Beach to Miami. HR. Doc.643 ¶ 36(h). Existing canals were incapable of controlling the flooding from the Everglades to the east coast. P.B. 7.

As a result of the flooding, Congress adopted the Central and South Florida Project for Flood Control and other Purposes, ("C&SF Flood Control Act") §203, 62 Stat. 1176, P.L. 858, 80th Cong., 2d Sess; P. B. 7, 8. Part of the Project was "to remove excess water from urban and farm lands, to conserve water during dry periods, **and prevent overflow of the coastal areas by water from the Everglades."**(Emphasis added) HR.Doc. 643 ¶ 9, ¶ 7; P.B. 8.

The C&SF Flood Control Act "created three interconnected reservoir areas" (out of the natural Everglades north of the Everglades National Park). HR Doc. 643 at 42 ¶ 59(a). These huge impoundments were called Water Conservation Areas 1, 2 and 3 (WCAs). RESTUDY at 1-15 to 1-17; J.A. Back Pocket; P. B. 8. The WCAs are bounded by levees which allow water to be maintained within them at higher levels than in the surrounding areas HR.Doc 643 at 42-43 ¶ 59(a); P. B. 8. (See Map, J.A.Exhibit 9).

These reservoirs, or WCAs, were built to store the maximum-record rainfall, plus the runoff from the area north of West Palm Beach Canal, the Everglades Agricultural

Area[4] and some flood discharge from Lake Okeechobee. Impoundment of these waters would prevent their flowing eastward and flooding the developed areas along the coastal ridge. HR Doc. 643 ¶ 59(a).

Before the separation of the Everglades into three Water Conservation Areas, the area that is now C-11 Basin west of the coastal ridge was part of the Everglades, which remained covered with surface waters year round. J.A. 114 ¶18. Today it is urban and agricultural in character, with significant residential areas. J.A.172 ¶ 18. Over five million people live along Florida's lower east coast. In the C-11 Basin, 136,000 people depend upon the S-9 pump to prevent flooding. 2000 Census. P. B.10-12.

The C-11 Canal runs east-west from the L-33 and L-37 levees[5] to tide waters in the east. J.A. 170-171 ¶ 5 & 10. It provides flood protection for the C-11 Basin, drainage for development, regulation of groundwater to prevent salt water intrusion, and allocation of water for irrigation and to recharge municipal well fields within the C-11 Basin. J.A.109; P. B.10.

There are three major local drainage districts within the C-11 Basin: the Central Broward, Southern Broward and the Weston District. These districts have drainage canals that discharge into the C-11. ("C-11 sub-basin districts"). Fla. Stat. Ch. 298; J.A. 12. The SFWMD issues Management and Storage of Surface Waters Permits to these districts under Fla. Stat. §373.413, Rule 40E.

The L-33 and L-37 levees separate WCA-3 from the C-11 Canal. The levees were constructed west of the coastal ridge, which was the natural eastern edge of the Everglades. The levees thus created new land for development east of the levees in central Broward County, reclaiming the portion of

[4] The Everglades Agricultural Area is 700,000 acres of Everglades south of Lake Okeechobee, and north of WCA-3A.SWIM Plan of SFWMD, March 13, 1992, p.6, 7.

[5] The Petitioner's Brief alleges that the Canal runs from the Miami Canal in WCA3-A to the coast. This is physically impossible since the L-33 and L-37 were constructed. (J.A. 160).

the Everglades between the levees and the coastal ridge. HR. Doc. at 42-43; J.A. Back Pocket; P. B. 9.

The S-9 pumping station was constructed in 1957 at the juncture of the L-33 and L-37 levees, which were constructed the year before in 1956. J.A. 97. The purpose of the S-9 pump station is to serve a large, urbanized area of central Broward County, by discharging urban runoff from the C-11 Canal into the WCA-3A. SWIM Plan Planning Doc. of SFWMD March 13, 1992 p.36, p.46.[6] P.B. 8.

The S-9 pump station pumps the water from the C-11 through pipes 60 feet across the L-33 and L-37 levees into WCA-3A. The pumping operation is described as "backpumping" because the pumping reverses the natural direction of the flow of the water, which is east, to the west. Because of the L-33 and L-37 levees and the higher elevation of the water in the WCA-3A, as well as the natural topography of the land, without the S-9 pump the water from the C-11 Basin could not flow into WCA-3A J.A. 159, 161.

The discharged water from S-9 contains pollutants, including phosphorus in concentrations not naturally found in the receiving waters. In the Everglades, the area immediately surrounding the S-9, and actually quite a distance surrounding the S-9, is very highly polluted. J.A.125.

The Everglades in WCA-3A is a phosphorous-limited system in which concentrations of phosphorous in water above natural background levels cause imbalances in natural populations of aquatic flora and fauna. J.A.164. The nutrient-lean (oligotrophic) condition of the aquatic ecosystem is one hallmark characteristic of the unspoiled Everglades that still exists in WCA-3A. This ecosystem is

[6] SWIM Plan for the Everglades, Planning Document Issued in compliance with the Surface Water Improvement and Management Act (Sec.373.451-373.4595 Fla. Statutes) and Rule 17-43.035, Fla. Administrative Code (Fla. Dept. of Environmental Regulation) and Marjory Stoneman Douglas Everglades Protection Act (Sec. 373.4592 Fla. Statutes), South Florida Water Management District, March 13, 1992.

changed by even slight increases in nutrient concentrations, particularly increases in the concentration of phosphorus. J.A.166. Negative effects on periphyton, which are microbial organisms and algae, occur when phosphorus levels exceed 10 – 20 parts per billion (ppb). J.A. 31, 39-40.

In phosphorus polluted areas one of the first things that changes is that the cattails outcompete the native vegetation that was located in that area, typically sawgrass and rooted floating aquatic macrophytes. J.A. 38.

From the S-9 pump station looking west into WCA-3A there is a monoculture of cattails. J.A. 38-39. Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and periphyton and the sawgrass do. The native fish do not survive there, nor can the aquatic bugs that fish feed on be found there... "it's a pretty nasty place." J.A. 38

The discharge from the S-9 contains other pollutants which are in excess of Florida water quality criteria. These exceedances were compiled by the Water Management District in a document entitled "Analysis of Historical Water Quality Data for Non-ECP Structures S-9..." prepared by Dr. Timothy J. Bechtel and Steven D. Hill (January 31, 1996, revised February 9, 1996. (Plaintiff's Complaint, Exhibit 2). (See also J.A. 33-41).[7]

In the Bechtel Report it is acknowledged by the SFWMD that there are numerous exceedances of metals water quality criteria (Table 1): pesticides, including ametryn – 4 detects out of 29; atrazine – 16 detects out of 29; hexazinone – 7 detects out of 29; Diuron – 2 detects out of 29; norflurazon – 7 detects out of 14; as well as excursions of dissolved oxygen, specific conductivity, unionized ammonia, total nitrogen, and high levels of phosphorus. Although the criteria exceedances for pesticides do not

[7] Under Florida regulation, a violation of any surface water quality criterion constitutes pollution. 62-302.500(e).

individually reach the toxic level, together they could become toxic to flora and fauna. J.A. 42.[8]

Any discharge of nutrients which changes the flora and fauna is a violation of a Florida narrative water quality standard. Fla. Reg. 62-302.300(13). The flora and fauna have been significantly altered by the discharge of the S-9 pump station in the Everglades. SWIM Plan Planning Doc., 1992 p.5; J.A. 134, 154,164, 167.

The source of the pollutants in the C-11 Canal from the local drainage districts canals are the suburban, urban, agricultural, and industrial stormwater, including a large above-ground refuse disposal area known as the Davie Dump, and a prison, as well as horse ranches and nurseries.[9] J.A. 75, 114. Many of the pesticides originate in suburban-urban habitats. J.A. 124.

Since the Water Management District has been in charge of the C&SF Flood Control Project, hundreds of thousands of acre-feet of polluted water have been pumped into WCA-3A via the S-9. J.A.162.

The water quality being discharged from the S-9 into the Everglades is going to get worse. With the proposed buffers, the relatively clean seepage water coming out of the Everglades will become a smaller and smaller component of the discharged water, and the concentrations of material will thus go up. Many of the new developments have lake systems which retain stormwater and they can contribute water to the ground water system. J.A.89, 122.

The Petitioner Water Management District has known for a long time that rapid urban growth and development within the basins which lie east of WCA-3A represent major water quality concerns for the Everglades.

[8] Each one of the individual pesticides exceedances, although less than the published toxic value, could have a synergistic effect, which could be toxic to a particular organism. J.A.42. Many of the pesticides originate in suburban-urban habitats. J.A. 124

[9] Petitioner alleges seepage is a major source of the water in the C-11. But Petitioner acknowledges that the run-off from the C-11 Basin is much more polluted than seepage. P.B.17-18.

SWIM, Planning Doc.1992, p.36. Continued development pressures in these flood prone areas (which include extensive tracts of former Everglades habitat) have resulted in continual requests for excess water to be backpumped west into the WCAs to meet flood protection or water supply needs. SWIM, Planning Doc. 1992, p. 36.

Since 1992, there has also been a noticeable increase in the volume of discharge entering WCA-3A from S-9 backpumping. In a study entitled Southwest Broward County Study, the effects of land use and water management on water quality in the C-11 Basin was studied by USGS. The study showed that from 1970 to 1993 there were few occurrences when the water level in the C-11 Basin rose above the 4.25 feet sea level. As more and more development proceeded, more and more water management was required to keep the water levels low enough to prevent flooding. J.A. 52.

The Water Management District knew in 1992 that water quality impacts associated with backpumping and rapid urban growth would potentially include increased loadings of nutrients, pesticides, heavy metals, synthetic organic compounds, and polycyclic aromatic hydrocarbons (PAH) in waters discharged into Everglades surface waters. SWIM Plan Planning Doc. 1992, p.36.

Urban and agricultural development have introduced pollutants into the ecosystem at rates that cannot be assimilated. The resulting imbalance of the ecosystem is manifest in declined faunal populations and an increase in invasive flora. Consolidated Report at 1-8. In hindsight, many of these problems are now recognized to be unanticipated effects of the existing C&SF Flood Control Project. They are exacerbated by the inescapable reality that people continue to move to south Florida at one of the highest rates in the nation. Corps Restudy at 3-1.

The result is a currently non-sustainable system of urban, agricultural and natural environments in south Florida that exceeds the capacity of, or is hampered by, the existing

system of water management. Corps Restudy at 3-1; J.A. 45; P.B. 12.

SUMMARY OF ARGUMENT

The Eleventh Circuit's determination that the Water Management District's discharge from the S-9 pump station is a point source discharge that is adding pollutants to navigable waters of the Everglades in violation of §301 of the Federal Clean Water Act ("CWA") and is therefore required to have a permit under § 402 of the CWA is undisputedly supported by the facts, and is faithful to the clear terms, structure and purpose of the CWA. The core of the Eleventh Circuit Decision is that:

> when a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs.
> *Miccosukee Tribe*, 280 F.3d at 1368-1369, Pet. App. p 7a-8a.

This decision is in line with all other Circuit Courts which have dealt with this issue. The "dam cases" that the Petitioner and the Solicitor General rely on are not affected by this decision. The facts and the issues are distinguishable.

The CWA makes the discharge of any pollutants unlawful unless in compliance with permit provisions of the Act. §301(a), 33 U.S.C. § 1311(a). The term, "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." CWA §502(12), 33 U.S.C. §1362(12). If this definition is met, a point source permit under the NPDES system under the CWA is required. CWA §402, 33 U.S.C. § 1342.

As the Eleventh Circuit observed, the parties do not dispute that the S-9 pump station which includes the pumps and the pipes which convey the discharge over levees, meets the definition of a point source, which is, "any discernable, confined and discrete conveyance..." CWA §502(14), 33 U.S.C. 1362(14), Pet. App. p. 5a. The parties also agree that the discharge contains pollutants. Pet. App.5a. JA 116. Petitioner's own studies of the discharge indicate that numerous state numeric water quality criteria and narrative criteria (prohibiting any nutrient discharges from changing flora and fauna), are being exceeded. JA 33-42. Nor is there any dispute that the area discharged into, the WCA-3A, is a navigable water. Pet. App. 5a.

The issue before the Eleventh Circuit was "whether the pumping of the already polluted water constitutes an addition of pollutants to navigable waters from a point source." Pet. App 5a. The Circuit Court found that, in determining if there is an "addition" to navigable waters the place to begin is to look at the receiving water as the relevant navigable water. This is supported by the plain meaning of the Act. The term is "any addition...**to** navigable waters". §502(12). The word "to" means in the direction of, or toward, not away from. Webster's New Century Dictionary, 2001 edition.

The Petitioner argues that there is no "addition" if pollutants do not originate at the point source. But, as the Solicitor General points out, this is an untenable argument because "point source" means "discrete...**conveyance**". CWA §502(14), 33 U.S.C. §1362(14); and conveyance means to transport. SG.B.21-22 (Emphasis added). The Eleventh Circuit opinion is in concert, holding that the point source is the "agent or instrumentality" or the "cause or reason" by which the pollutants are added to navigable waters. Pet. App. 7a.

Petitioner also argues that there is no "discharge of pollutants" because the C-11 Basin and the Everglades natural area known as WCA-3A are the same body of water and there can be no discharge if the pollutants are already in

the navigable water. P.B. 22, 47, 48. But, the C-11 Canal is a part of a stormwater management system, under Fla. Stat. §373.403(10), which receives urban and suburban stormwater from the canal systems of three local drainage districts within the C-11 Basin. Fla. Stat. Ch. 298, JA 12. These drainage canals are the source of much of the pollutants that are being discharged through the S-9. J.A. 75, 114. The WCA-3A, in contrast, is part of the natural Everglades ecosystem. They are not the same water.

The Petitioner and the Solicitor General both assert that the entire South Florida Everglades ecosystem and the entire water management system in South Florida, constructed under the Central and South Florida Flood Control Act, ("C&SF Flood Control Act") §203.62 Stat. 1176, are one water body. As one water body, the discharge from one to the other cannot be a "discharge of pollutants" because the pollutants are already in the water. Factually this is even more absurd than the argument that the C-11 Basin and WCA-3A are the same.

The South Florida ecosystem is a diverse, complex series of fresh water rivers, lakes, flat gradients of everglades flowing south and east out through more rivers that have been converted to canals and out into saline estuaries. See Everglades Consolidated Report, January, 2003, p.5, P.B. 6. The C&SF Flood Control Project is an amalgam of projects constructed over many years to try to control flooding and maintain urban and agricultural water supply. Both the U.S. Army Corps of Engineers and the Water Management District are now attempting to undo the parts of C&SF where the project is harming the Everglades. That includes tearing down the levees separating WCA-3A and WCA-3B, as well as between WCA-3B and the National Park, to restore sheet flow to these areas. P.B.15-17, Consolidated Report at 7A.

The Petitioner then argues, in the alternative, that the discharge between the two navigable water bodies is not "disposal" ("discharge") of pollutants because the discharge is a "flow diversion" facility and is therefore a nonpoint source of pollution, under CWA §304(f)(2)(F), 33 U.S.C.

§1314(f)(2)(F). P.B.24. This argument ignores the plain meaning of the CWA which says that "**any** addition of **any** pollutant to navigable waters from a point source" is a discharge of pollutants. CWA§ 502(12), 33 U.S.C.§ 1362(12) that is then governed by the NPDES requirements. CWA §§ 301(a) and 402, 33 U.S.C. §§1311(a) and 1342. It also ignores the clear distinction between point source under CWA § 502(14), 33 U.S.C. § 1362(14) and nonpoint source. Clearly, any "confined and discrete conveyance…" is only a point source when the pollutants "are or may be **discharged**." (Emphasis added) The critical difference of a point source is the act of being discharged, within the meaning of the definition of "discharge of pollutants." Any other interpretation would render the terms meaningless.

To find that discharges of pollutants from one navigable water to another is not included in Congress's clear objectives and structure within the CWA would undermine the integrity of the Act. It would throw into confusion what up to now has been clear, that the simplicity of the language of the CWA means what it says.

The Solicitor General argues every water of the United States is a navigable water, and the discharge from one to another would not be adding pollutants "to navigable waters," since the pollutants are already in navigable waters. As a result the discharge from one water to another is a nonpoint source discharge, not a point source, under the CWA. SG.B.p.13. If this logic were upheld Congress's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" CWA §101(a), 33 U.S.C.§ 1251(a) would be severely undermined. The meaning of what is a point source under the CWA would be compromised, and the protections created through the NPDES permit program would be lost to many of our nation's most valued waters.

As stated previously, the determination of what discharges are governed by an NPDES permit is set out in §§ 301, and 502(6),(12)and (14) of the CWA, 33 U.S.C. §§1311 and 1362(6)(12) and (14). It is unlawful to discharge a

pollutant under §301.The "discharge of pollutants" occurs if there is "**any** addition of **any** pollutant **to** navigable waters from any point source." (Emphasis added) This definition has always meant just that – that "any" point source is regulated, unless specifically exempted by the CWA. As this Court stated in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), "Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." Id. at 318.

There is no statutory justification to remove discharges from one body of water to another, if they are adding pollutants, as defined by the Act, § 502(6), 33 U.S.C. §1362(6), **to** navigable waters, from a point source. To do so will be to lose all the protections of the CWA for the waters being degraded by water-to-water discharges.

In arguing that the discharge from one body to another is not an addition the Petitioner and the Solicitor General look to the "Dam" cases, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (DC Cir.1982), and *National Wildlife Federation v. Consumer Power*, 862 F.2d 580 (6th Cir.1988).

The relevant facts and issues of the dam cases are clearly distinguishable from this case. The facts in both *Gorsuch* and *Consumer Power* are that the water body is the same above and below the dams. In this case the Water Management District is "backpumping", reversing the natural flow of the water in the C-11 Basin by operating the S-9 pump. When the S-9 pumps, the water flows from east to west, into the Everglades, in order to be able to discharge stormwater from the C-11 Basin into the WCA-3A. J.A. 159, 161. Without the S-9 pump the polluted water could not flow west past the L33 and L37 levees. J.A. 160-161.

Also, the source of the pollutants in the water in the C-11 canal is from the stormwater collection system of the Ch. 298 Basins within the C-11 Basin. In the Dam cases the source of pollutants was the dam itself, and the sole issue was whether "dam induced" pollutants, which are already in

the water, are added "from an outside source," as EPA has required. *Gorsuch* at 161. The Dam cases did not adjudicate the question as to whether the discharge from one navigable water to another requires a permit, although the EPA used that language.

The Eleventh Circuit held that "outside source" means "any place outside the particular water body to which pollutants are introduced", Pet. App. 6a, n.5. , Citing *Catskill Mountains Chapter of Trout Unlimited, v. City of New York*, 273 F.3d 481, 490 (2nd Cir 2001). That test is consistent with the concept that all point sources, if they discharge pollutants "to" navigable waters, must be regulated.

Both the Petitioner and the Solicitor General point to the current permit for the S-9 to argue that another is not needed. That permit is a nonpoint source permit. The principal difference between the protections from point source discharges and nonpoint sources is that the point source requirements focus on protecting a water body from the addition of pollutants from somewhere else outside the water body; while nonpoint source controls focus on cleaning up pollution within the water body. CWA §§304(f)(2)(F), 319, 33 U.S.C. §§ 1314(f)(2)(F), 1329. The loss of the ability to require compliance with specific water quality criteria at the point of discharge as well as the enforcement mechanisms for complying with specific permit parameters at the point source would insure degradation from the discharge of pollutants not regulated from the point where they enter the water body.

The existence or nonexistence, the effectiveness or the non-effectiveness, of a state's nonpoint source plan has no relevance in the determination of whether a point source is a "discharge of pollutants" under the CWA. That evaluation is made by applying §301 and the definitions set out in §§ 502(6), (12), and (14) of the CWA. 33 U.S. C. §§ 1311, 1362(6), (12), and (14).

Stopping the pollution from coming into the Everglades from the S-9 either by eliminating the discharge or cleaning it up through the requirement of an NPDES

permit does not interfere with the restoration plan for the Everglades. The NPDES permit supports the restoration. It does not conflict with the state's nonpoint source plan, it works in conjunction with it. The nonpoint source projects reduce the pollutants within the C-11 Basin. When it is necessary to discharge water that is polluted into the Everglades through the S-9 from the urban areas to the east, then that discharge is a point source, and must be treated as such under §402 of the CWA.

ARGUMENT

Grant of Certiorari

Certiorari has been granted in this case on the issue "whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act."

Point Source Does Not Have To Generate Pollutants

The Petitioner Water Management District argues since the S-9 pump station adds nothing to the water being pumped that the discharge is not an "addition of any pollutant…from any point source." Petitioner asserts that the word "from" means that the pollutants must originate from the point source. P.B. 24. The Eleventh Circuit interpreted the word "from" to mean caused by, and found that the term "any addition of any pollutant…from a point source" means that the addition was caused by the point source. The point source was the cause-in-fact of the addition. Pet. App. 7a.

The term "addition of any pollutant" is taken from the definition of "discharge of a pollutant" under § 502(12) of the CWA, which states, "any addition of any pollutant to navigable waters from any point source," 33 U.S.C.

§1362(12). Congress made "the discharge of any pollutant unlawful, (CWA §301, 33 U.S.C.§1311), unless in compliance with provisions of the Act, including an NPDES permit under §402 of the CWA. CWA §402, 33 U.S.C. §1342.

The CWA is a comprehensive act of Congress as it was passed in 1972, amended in 1977 and amended again in 1987, with the specific objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. CWA §101(a), 33 U.S.C §1251(a). In order to achieve this goal Congress stated that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by1985." CWA§101(a)(1),33U.S.C. §1251(a)(1).

A "pollutant" under the CWA means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." CWA §502(6), 33 U.S.C. §1362(6).

A "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stick, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. CWA §502(14), 33 U.S.C.§1362(14).

Within this framework, if the Petitioner's argument is upheld it would mean that any pump discharging even from a sewage treatment plant or from an industrial treatment plant would be excluded, because the pollutants did not originate at the pump. There would be few if any point sources that would be governed by the CWA.

Petitioner alleges that the 1972 Legislative History of the CWA supports the argument by language that indicates the goal of the Act is to stop the pollutants where the pollutants originate. The language Petitioner relies on is: "'Congress recognized' in the CWA that to achieve its goals

'it is essential that discharge of pollutants be controlled at the source.'" (P.B. 27, 32).

By extracting this language from its context Petitioner is able to mischaracterize its meaning. In the context of the legislative history, this language is referring to the Act's control strategy of stopping the pollutants at the source of **discharge** to navigable waters.[10] The sentence following the provision quoted by Petitioner states: "Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." Water Pollution Control P.L. 92-500 Legislative History, 2 U.S.C.C.A.N. P.3742-3743 (1972).

The Solicitor General, in his Amicus Brief, stated that "The Court of Appeals correctly rejected the SFWMD's argument (P.B. 20) that pollutants are added "from a point source only if the source itself is the origin of the pollutants." See Pet. App. 7a n.6. The Solicitor General noted that the District of Columbia Circuit rejected that interpretation more than 20 years ago, Citing *Gorsuch*, 693 F.2d at 175, n. 58. SG.B. 21.

As the Solicitor General noted, the definition of a point source under the CWA is, "a discernible, confined, and discrete *conveyance*, including but not limited to any pipe, ditch channel, tunnel, conduit, well, discrete fissure, container…" (Emphasis added by SG). CWA §502(14), 33 U.S.C.1352(14). These objects typically transport rather than generate pollutants, such as "sewage," "biological materials," and "industrial, municipal, and agricultural waste," CWA §502(6), 33 U.S.C.§1362(6). SG. B. 21-22.

To convey something is to be the "agent or instrumentality," as the Eleventh Circuit found, of

---

[10] The context of the quote is: "The control strategy of the act extends to navigable waters…water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." quoting S. Rep. No. 92-414, at 77 (1971).

transporting, causing the pollutants to move from one place, the C-11 canal, to another, the Everglades at WCA-3A. J. App. at 8, n.6.

The Natural Everglades and the State of Florida Water Management System Known As The C&SF Project Are Not One Single Water Body

The Petitioner and the Solicitor General try to overcome the Eleventh Circuit's determination that the S-9 discharge is a point source discharge that needs an NPDES permit under §402 of the CWA by suggesting that the waters of the C-11 and WCA-3A are the same because they are part of comprehensive water management system, the Central and South Florida Flood Control Project, (C&SF Flood Control Project). As a result, they argue, a discharge from one part of that system, the C-11 canal, into another, the WCA-3A, is not a discharge to a navigable water because the pollutants from the C-11 are already in the water. The S-9 is simply moving the water from one place to another within the unitary water system. P.B. 22, 47, 48.

To try to argue that the waters of the WCA-3A and the C-11 Canal are the same the Petitioner builds a series of complex factual assumptions. It is assumed that the C-11 is a part of the C&SF Flood Control Project. It is assumed that the C&SF Project is a unitary water management system. It is assumed that as a comprehensive water management system it manages the entire Everglades ecosystem. Then, with an enormous leap, it is assumed that because it manages the ecosystem, the C&SF Project is therefore a part of the entire Everglades ecosystem. P.B.1, 5, 8,10,11,22, 47 and 48.

The natural ecosystem in South Florida is different than the water management systems that have been constructed to control the natural systems. The natural system is also not one entity. It includes the Kissimmee River, Lake Okeechobee, the Everglades Agricultural Area, the Everglades separated into the three Water Conservation Areas, the rivers and estuaries to the east, and the Everglades

National Park. See SFWMD Everglades Consolidated Report, January 1, 2003, P.B. 5. The water management system is also not just one entity. It is broken down into canals and levees and pumps that are not all interrelated.

The State of Florida has established a water classification system, required under §303 CWA, 33 U.S.C §1313; which is set forth at Fla. Admin. Code § 62-302.400. There are five general classifications: Class I=Potable Water Supplies; Class II=Shellfish Propagation; Class III=Recreation, well balanced fish and wildlife; Class IV=Agricultural Water Supplies; Class V=Navigation, Utility and Industrial.

Within the South Florida ecosystem there are at least four of these classifications: Lake Okeechobee is a Class I water body. The Estuaries to the east and Florida Bay to the south are Class II. The Loxahatchee refuge and the other two WCAs are class III. Within the Everglades Agricultural Area, the canal systems (defined in Fla. Stat. 373.4592(2)(e)), are Class IV waters.

In addition to the five basic classifications are Special Protection classifications, including "Outstanding Florida Waters" and "Outstanding National Resource Waters" These classifications require no degradation of water quality. Lake Okeechobee, the Loxahatchee National Wildlife Refuge, the Everglades National Park are all Outstanding Florida Waters. Fla. Admin. Code § 62-302.700(1),(2). The Everglades National Park is also an "International Biosphere Preserve" and "World Heritage Site," that is home to numerous threatened and endangered species. J.A. 158.

The canal system know as the C-11 Basin is a stormwater collection system, which means "a system...to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use or reuse water to prevent or reduce flooding, overdrainage, environmental degradation and water pollution or otherwise affect the quantity and quality of discharges from the system." Fla. Stat. § 373.403(10).

In fact, these water management systems moving polluted water from the Everglades Agricultural Area and the urban areas that are to the east and discharging into natural areas, including Lake Okeechobee and the Everglades, is one of the principal reasons why the natural ecosystem is in such dire straights now.

The Comprehensive Everglades Restoration Plan (CERP) recognizes that much of the degradation that the Everglades Protection Area, (the CWAs and the Park), are experiencing is a direct result of the C&SF Flood Control Project. The altered water regimes have reduced the area of the Everglades by half and are responsible for a continuing state of decline of that natural area. P.B. 12; RESTUDY at 3-1. Water quality has also been degraded by urban and agricultural development that has introduced pollutants into the ecosystem at rates that cannot be assimilated. P.B. 13; Consolidated Report at 1-8.

The C-11 Canal is quite different than the WCA-3A, in terms of quality, use and function. The C-11 canal is a stormwater drainage basin, as defined by Fla. Stat. §373.403(10). The purpose of the C-11 Canal is to provide flood protection for the C-11 Basin, drainage for development, regulation of ground water to prevent salt-water intrusion, and allocation of water for irrigation and to recharge municipal well fields. J.A. 109. The C-11 basin pollutants come from the urban suburban industrial and agricultural areas within the 298 subbasins that discharge by permit into the C-11.

The water quality in the C-11 Basin that discharges from the C-11 Canal into the WCA-3A through the S-9 pump contains many pollutants which exceed Florida's water quality criteria. J.A.42. These pollutants are causing a significant change in the flora and fauna of the WCA-3A at the discharge point of the S-9. J.A. 134, 154, 164, 167. It is because of these pollutants and the problems they are causing from the C-11 into WCA-3A that the CERP Project has just recently adopted and funded numerous projects to hold the water back in the C-11 and not discharge to the S-9

into the Everglades. The Petitioner Water Management District has acknowledged that restoration projects under the Everglades Forever Act and CERP include several projects to improve the quality of water in the C-11 Basin pumped by the S-9 into the WCA-3A. P. B. 17.

In its natural state, the Everglades flowed south then east through rivers flowing through the coastal ridge to the coast. HR.Doc 643. Several of those rivers, the South New River and the North New River have been converted to canals. The South New River Canal is now the C-11 canal. J.A. 175.

With the operation of the S-9 pump station, the C-11 waters can now be reversed, caused to flow in the opposite direction of the natural flow, which is west to east from the Everglades to the coast. When the S-9 pumps operate, the water flows from east to west, into the Everglades, in order to be able to discharge stormwater from the C-11 Basin into the WCA-3A. J.A. 159, 161.

The Water Management District argued before the Eleventh Circuit that the historical hydrological connectedness of these two bodies of water (1) precludes a finding that the WCA-3A and the C-11 Canal are two distinct bodies of water, and (2) precludes a finding that the operation of the S-9 changes the "natural" flow of water between these two bodies. Pet.App. at 8a n8.

The Eleventh Circuit rejected the Water District's argument, finding that since the completion of the L-33 and L-37 levees (1956), water does not flow from the C-11 Canal into WCA-3A. "**Man has made the two bodies of water two separate and distinct bodies of water**." Pet.App. at 9 n 8.

The Petitioner's argument is that the S-9 discharge is not an addition because, **as a matter of law**, the C-11 and WCA-3A are the same water. P.B. 47, 48.

The basis for the argument is a quote from the Solicitor General's Brief to this Court on the question of Certiorari, that stated the Solicitor General's belief that:

> The C-11 Canal and the WCA-3A can appropriately be viewed, for purpose of §402 of the CWA, as parts of a single body of water. The characterization is appropriate because the C-11 Basin, the C-11 Canal and the WCA-3A share a unique, intimately related and hydrological association. Furthermore, these components were created and are managed pursuant to legislative direction – by both the United States and the State of Florida – as a part of a single integrated resource. P.B. 22, 48.

Thus, in attempting to argue that the C-11 and the WCA-3A are the same water body as a matter of law, the Petitioner and the Solicitor General refer vaguely to "legislative direction", apparently the enabling acts for the Water Management District to run the C&SF Flood Control Project; and for the CORPS of Engineers; and those legislative acts that were passed to deal with the litigation, the "Marjory Stoneman Douglas Everglades Protection Act of 1991, and the Everglades Forever Act of 1994. These acts do not deal with what an "addition" means under the CWA.

There is no basis to conclude as a matter of fact or of law either that the C-11 and WCA-3A are the same water body or that the entire South Florida Everglades ecosystem is the same navigable water as the C&SF Flood Control Project. While the water management system may be considered a navigable water, it is a stormwater management system. It is not the same as the natural everglades ecosystem.

In other words, the discharging of pollutants from the water management system into the Everglades is discharging from one navigable water of much lower quality and much different uses, into another which is a pristine ecological treasure, as the C-11 does into the WCA-3A.

Discharges from One Body of Water to Another Are Not Exempted Under The Definition of Point Source

As an alternative to the "unitary water" theory the Petitioner and the Solicitor General argue that if the point source discharges from one navigable water to another that it is not an addition, because the pollutant is already in "navigable" water. There is no language in the CWA that makes that qualification. Every point source is meant to be affected by this requirement.

The starting point for statutory interpretation is the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The first step "is to determine whether the language at issue has a clear and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" 519 U.S. at 340.

The language in the Act is clear and unambiguous. It is unlawful to discharge a pollutant from a point source CWA. §301(a), 33 U.S.C. §1311(a), unless in compliance with the Act. CWA §402, 33 U.S.C §1342.

A "discharge of a pollutant" occurs when there is "**any** addition of **any** pollutants **to navigable waters** from **any** point source. CWA §502(12), 33 U.S.C.§ 1362(12). (Emphasis added). It is clear then that the focus of determining whether there is a discharge of pollutants is to look "**to**" the receiving body of water, as the Eleventh Circuit held. Pet App.at 8a; and determine if there are "**any**" pollutants being added to the receiving water from "**any**" point source.

The meaning of the terms "any" and "to" are unambiguous. "Any" means every or all, in relation to which pollutants and which point sources. Webster's New Century Dictionary, 2001 edition. "To" means simply "motion or direction toward a point, person, place or thing,"

not "from". Webster's New Century Dictionary, 2001 edition.

Congress's intent in enacting the 1972 Clean Water Act Amendments was clearly to establish an all-encompassing program of water pollution regulation S. Rep. No. 92-414, at 95, 2 Leg. Hist. 1511. As this Court stated, the 1972 Amendments established "a comprehensive program for controlling and abating water pollution" In *Milwaukee v. Illinois*, 451 U.S. 304 (1981) this Court concluded that, " **Every point source discharge is meant to be prohibited** unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." Id. at 318.

In a recent decision by the Circuit Court for the District of Columbia the Court looked at the meaning of the term "addition" in relation to CWA §401(a)(1), 33 U.S.C. §1341(a)(1). In this case, the Circuit Court held that, in the case of a discharge from the proposed dam facility, "that even a temporary increase in a discharge could have a negative water quality impact, 'we elect to remain faithful to the language chosen by Congress,' North Carolina, 112 F.3d at 1188, and hold that an activity that 'may result in **any** discharge' triggers the certification requirements of section 401(a)(1), 33 U.S.C. §1341(a)(1)." (Circuit Court's emphasis). *Alabama River Alliance* v. *F.E.R.C.* 325 F.3d 290, 300 (D.C.Cir.2003).

As the Tenth Circuit Court of Appeals found in *U.S.* v. *Earth Sciences Inc*, 599 F.2d 368, 373 (10thCir. 1979): "It contravenes the intent of FWPCA (CWA) and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point."

The objective of the CWA is to restore the chemical, physical, and biological integrity of our Nation's waters. CWA §101(a), 33 U.S.C. §1251(a). To accomplish this, Congress set the goal of the CWA to eliminate the discharge of pollutants into navigable waters. CWA §101(a)(1), 33 U.S.C.§ 1251(a)(1). In the interim, while finding ways to eliminate discharges of pollutants, Congress set the goal of

the CWA to attain water quality that will support fish and shellfish and wildlife. CWA §101(a)(2), 33 U.S.C. 1251(a)(2). In order to implement these objectives and goals the CWA establishes the system of requiring compliance with water quality effluent limitations at the source of the discharge. CWA §402, 33 U.S.C.§ 1342.

The legislative history of the 1972 Act supports the Eleventh Circuit: "The Committee has extracted from the Refuse Act the basic formula and added municipal discharges to it, so that before **any** material can be added to the navigable waters authorization must first be granted by the Administrator, or State in the case of an approved State program, under Section 402." 2 U.S.C.C.A.N. P 3742-3743 (1972). (Emphasis added).

In the case of *EPA v. California ex rel. State Water Resources Control Board ("EPA v. California")*,426 U.S. 200 (1976), this Court dealt with the history of what prompted the 1972 Amendments, beginning with the fact that the federal water pollution program up to that time was "inadequate in every vital aspect." S.Rep. 92-414, Id. at 202-203. This case recognized that the 1972 Amendment introduced two major changes in the methods to set and enforce standards to abate and control water pollution. "First, the Amendments are aimed at achieving maximum 'effluent limitations' on 'point sources,' as well as achieving acceptable water quality standards." *EPA v. California* 426 U.S. at 205. "Second, the amendments established the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations." Id at 205.

The purpose of the major changes was to deal with the problem of enforcement inherent in the prior cumbersome enforcement procedures. The prior procedures employed ambient water quality standards which specified acceptable levels of pollution in the navigable waters, rather than applying the specified acceptable levels at the source of the discharge into the water. As this Court stated in *EPA v. California*, "Such direct restrictions on discharges facilitate

enforcement by **making it unnecessary to work backward from an over-polluted body of water** to determine which point sources are responsible and which must be abated." Id at 204. (Emphasis added) In short, the NPDES permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the CWA. Id. at 205.[11]

In the light of this objective and these goals, and the revolutionary changes of the 1972 Amendments requiring compliance at the source of the discharge, if Congress wanted to qualify this protection, and not to limit pollutants from discharges from one navigable water to another, then it could have specifically done so. Congress, in its definition of the term "pollutant" specifically exempted two categories, sewage from vessels or a discharge incidental to the normal operation of a vessel of the armed forces; and water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production, and disposed of in a well, if the well is approved by the state. CWA §502(6), 33 U.S.C. §1362(6). It could have extended the exceptions to include pollutants from one navigable water to another. It did not.

To find that discharges of pollutants from one navigable water to another is not included in Congress's clear objectives and structure within the CWA would undermine the integrity of the Act. It would throw into confusion what up to now has been clear, that the simplicity of the language of the CWA means what it says.

The whole concept of establishing and enforcing technology based limits on individual discharges into the country's navigable waters from point sources CWA §301 and §402 establishing water quality standards under CWA

[11] The Solicitor General noted that "...the Clean Water Act's NPDES permitting program typically imposes limitations on a point source discharge by establishing permissible rates, concentrations, or quantities of specified constituents **at the point where the discharge stream enters the waters of the United States.** S.G. B.p.6. (Emphasis added).

§303(a), classifying each separate water body in accordance with its use, CWA §303(c)(2)(A), will become superfluous.[12] So, too, would be the requirement that state standards include an antidegradation requirement under §303(d)(4)(b).

The Dam Exemption

The Water Management District bases its argument that discharges from one water body to another are exempt on language taken from the "Dam" cases, *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (DC Cir.1982), and *National Wildlife Federation v. Consumer Power*, 862 F.2d 580 (6th Cir.1988).

The relevant facts of the dam cases are clearly distinguishable from this case. The facts in both *Gorsuch* and *Consumer Power* are that the water body is the same above and below the dams. As the Sixth Circuit noted in *Consumer Power*, the Ludington facility "merely changes the movement...of navigable water when it temporarily impounds water from Lake Michigan in a storage reservoir, but does not alter their character as waters of the United States." *Consumer Power* at 589. The same is true for the river in *Gorsuch*.

In the case of the discharge from the S-9 into WCA-3A, the water flow is reversed from the way the water would flow naturally. In its natural state, the Everglades flowed south then east through rivers flowing through the coastal ridge to the coast. HR.Doc 643. Several of those rivers, the South New River and the North New River have been converted to canals. The South New River Canal is now the C-11 canal. J.A. 175. With the operation of the S-9 pump station, the C-11 waters can now be reversed, caused to flow in the opposite direction of the natural flow, which is west to east from the Everglades to the coast. When the S-9 pumps, the water is pumped over the levees, which would have

[12] See Fla. classifications listed above, Page 19.

prevented any flows from east to west, into the Everglades. J.A. 159, 161.

Also, the source of the water in the C-11 canal is from the stormwater collection system of the Ch. 298 Basins within the C-11 Basin. JA 12, 75, 114,124. There is no question, then, that the pollutants being discharged through the S-9 are from outside the WCA-3A.

Also, the sole issue in the dam cases was, "whether certain dam-induced water quality changes constitute the 'discharge of a pollutant' as defined in §502(12) of the Act, 33 U.S.C. §1362(12)," *Gorsuch*, at 161; not whether the discharge from one navigable body to another is exempt.

The *Gorsuch* and *Consumer Power* Courts relied on an EPA opinion that dams are not subject to an NPDES permit because "(an) addition from a point source occurs only if the point source itself physically *introduces* a pollutant into water *from the outside world,*" and pollution resulting from dams, *dam-induced pollution*, is exempt from needing a permit under § 402 of the CWA. *Gorsuch*, at 165. *Nat'l Wildlife Fed'n v. Consumer Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988).

The EPA language, which the courts repeat, "dam caused pollution ...merely passes through the dam from one body of navigable water (the reservoir) to another (the [illegible] river)," is thus not reflective of the facts in these cases.

What these cases hold is that man-induced changes to the flow of pollutants through discrete conveyances is a discharge of pollutants under CWA §301(a), when pollutants are added from the outside world.

---

[1] The EPA language, "merely passes through the dam from one body of navigable water (the reservoir) to another (the river)" is not an interpretive opinion that that a hydropower reservoir whose source is the same river that it discharges back into is a separate body of water, and that as a result of that fact no NPDES is required.

Outside Source Means Any Place Outside the Particular Water Body To Which Pollutants Are Introduced.

The Eleventh Circuit considered and dismissed the argument that the point source discharge of pollutants from one navigable water to another is exempt because it is not a discharge from an outside source.

Instead, the Court adopted the definition of the Second Circuit that "outside world" includes "any place outside the particular water body to which pollutants are introduced". *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001). The Eleventh Circuit found this interpretation to be consistent with EPA's position and the Eleventh Circuit's determination that a redeposit of soil which has been dredged by a boat's propellers can constitute an addition of pollutants requiring a 404 "dredge and fill" permit, 33 U.S.C. §1344. *U.S. v. M.C.C. of Fla. Inc.*, 772 F.2d 1501, 1505-06 (11th Cir.1985), vacated on other grounds, 481 U.S.1034 (1987), readopted in relevant part, 848 F.2d 1133 (11thCir.1988). (Pet.App. at 7a-8a, n 5.)

The Eleventh Circuit definition of outside source is also consistent with the Ninth Circuit in *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276 (9th Cir. 1990), where a placer mine operation mines for gold by digging in and adjacent to the stream and then discharging non-gold material back. The Ninth Circuit held that "Because the material discharged came not from the streambed itself, but from outside it, its discharge into a waterway clearly constitutes an 'addition.'" Id. at 1285. The Ninth Circuit compared this finding with the deference granted EPA's opinion that pollutants which are added from an outside source are "additions." Id. at 1286.

The Eleventh Circuit concluded that, "an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters." Pet. App. at 7a. The Eleventh Circuit then held: "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another

distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." Pet. App. 7a.

As the Eleventh Circuit noted, this conclusion is consistent with both the First and Second Circuits. In *DuBois v. US Department of Agriculture,* 102 F3d.1273 (1st Cir. 1996), the First Circuit concluded that the piping of water from the polluted East Branch River for commercial use and its proposed release into the upstream Loon Lake would constitute an addition of pollutants from a point source. Id. at 1296-99. Then, in *Catskill Mountains*, the Second Circuit concluded that the diversion of water from a reservoir containing pollutants by tunnel into a creek for which the reservoir was not naturally a source would constitute an addition of pollutants from a point source. *Catskill Mountains*, 273 F.3d at 492. Both courts emphasized that the two bodies of water were separate and that pollutants would not enter the second body except for the point source. The Second Circuit in *Dague* v. *City of Burlington,* 935 F.2d 1343, 1354-55 (2nd Cir.1991), rev'd in part on other grounds, 505 U.S. 557 (1992) held that a culvert which conveyed polluted waters from Beaver Pond to a portion of Winooski River constituted discharge of pollutants under the CWA.[14]

In a more recent decision the Ninth Circuit held that water from a deep mine that naturally contained chemical pollutants, that were extracted as part of a coal bed methane gas extraction process, could not be discharged into the Tongue River without a §402 permit. *Northern Plains Resource Council v. Fidelity Exploration and Development Company*, 325 F.3d 1155, 1157-1158. (9th Cir. 2003).

The Eleventh Circuit then held that when a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another body of navigable water into which it would not otherwise

[14] This Court has recognized the wisdom of allowing difficult issues to mature through full consideration by the Courts of Appeals. *E.I. DuPont de Nemours & Co. v. Train* 430 U.S. 112 (1977).

have naturally flowed, that point source is the cause-in-fact of the release of pollutants into navigable waters. Pet. App. 7a. Because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs. Pet. App. 7a.

This "but for" holding is consistent with *United States v. Earth Sciences, Inc*, 599 F.2d 368 (10th Cir.1979) where the court rejected a gold mine operator's argument that the point source discharge had to be an intentional discharge of pollutants. In finding that the overflow of leachate from primary and reserve pumps designed to catch excess runoff is a point source discharge the court found that the combination of sumps, ditches, hoses and pumps as a closed circuit, when it fails because of flaws, the escape of liquid from the confined system is a point source. 599 F.2d at 374.

The Eleventh Circuit held that addition from a point source means that the discharge point causes the pollutants to enter the navigable water being discharged into, and that the pollutants are from "outside" the water being discharged into.

In the C-11 Canal the water in the canal has been contaminated from urban and suburban as well as industrial and agricultural areas in the sub-basins that are collected in the subbasins' canal systems and drain into the C-11 canal. From these areas nutrients and pesticides are introduced into the C-11 Canal, and then "added" into the Everglades. P. B.11; J.A. 116, 127, 133.

The S-9 discharge is definitely altering the water in WCA-3A. J.A. 30-35, 125. The discharged water from S-9 contains pollutants, principally phosphorus, in concentrations not naturally found in the receiving waters. The discharge is causing violations of Florida's water quality standards, both

numeric and narrative.[15] J.A. 33-41; Plaintiff's Complaint Exhibit 2.

In the Everglades, the areas immediately surrounding the S-9, and actually quite a distance surrounding the S-9, is very highly polluted. J.A. 125. From the S-9 pump station looking west into WCA-3A there is a monoculture of cattails. J.A. 38-39. Once the cattail stand dominates the area, it doesn't add oxygen to the water the way the rooted aquatic plants and periphyton and the sawgrass do. The native fish do not survive there, nor can the aquatic bugs that fish feed on be found there... "it's a pretty nasty place." J.A. 38.

The Discharge From the S-9 Pump Station Into the Everglades Is Not A Nonpoint Source Flow Diversion Facility Under Section 304(f)(2)(F)

The Petitioner Water Management District argues that the S-9 pump station is a nonpoint source discharge because it is a flow diversion facility, under Section 304(f)(2)(F) of the Clean Water Act, 33 U.S.C.§ 1314(f)(2)(F). To determine that the S-9 discharge, which is a point source discharge of pollutants from an outside source, is a nonpoint source under this section of the CWA would be to carve a major new exemption from the definition of a point source discharge. CWA §502(14), 33 U.S.C. § 1362(14).

The language of Section 304(f)(2)(F) is clear. It states, when read in full, that EPA is required to provide information and guidelines for identifying and evaluating nonpoint sources of pollutants, and for procedures to control pollution from nonpoint sources, including: (F) "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the

[15] Under Florida regulation, a violation of any surface water quality criterion constitutes pollution. 62-302.500(e).

construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. 1314(f)(2)(F).

There is no support for the argument that this section is meant to be an exemption for all discharges of pollutants from any dam, levee, channel, causeway, or flow diversion facility from the requirements of §301(a) and §402 of the CWA. By its express terms, Section 304 is an information provision of the CWA.

Within the definition of "point source" is the specific exemption for "agricultural stormwater discharges and return flows from irrigated agriculture. If Congress wanted to exempt all discharges, including point source discharges of pollutants from dams, levees, channels and flow diversion facilities then it could have done so in 1977, when it exempted agricultural stormwater discharges and irrigation return flows from the definition of "point source." CWA §502(14), 33 U.S.C. §1362(14). However, Congress did not.

As the Tenth Circuit Court of Appeals found in *U.S. v. Earth Sciences Inc*, 599 F.2d 368 (10thCir. 1979):

> It contravenes the intent of FWPCA (CWA) and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point. Therefore, we hold that the District Court erred in interpreting 33 U.S.C. §1314(f) as enumerating nonpoint source exemptions from FWPCA regulations. Mining and the other categories listed in §1314(f)(2) may involve discharges from both point and nonpoint sources and those from point sources are subject to regulation.
>
> Id at 373.

Many of the terms in §304(f)(2)(F) are similar in meaning to the terms contained in the definition of point source, which Congress has defined point source as "any discernible, confined and discrete conveyance..." CWA §502(14), 33 U.S.C. §1362(14). The difference between these two provisions is that even a discrete conveyance

would not be a point source unless it is a conveyance "from which pollutants are or may be discharged." CWA §502(14).

In addition, on the face of the Act, the lists in §304(f)(2)(F) cannot be read to mean they are exclusively nonpoint. The construction of dams, levees, channels, causeways or flow diversion facilities has long been recognized as requiring a point source permit because it entails "the discharge of dredged or fill material" within the meaning of CWA §404.

In the present case as the Eleventh Circuit noted, the parties agree that pollutants are being discharged from the S-9, but the S-9 does not create any pollutants. All the parties also agree that the source of much of the pollutants is from upstream urban, suburban, industrial and agricultural stormwater that is being discharged into the C-11 Canal from the three local drainage districts. J.A. 116, 127, 133. The Petitioner acknowledges that the runoff from the C-11 Basin is more polluted than the return seepage from WCA-3, and that phosphorus levels going into WCA-3 will be reduced by decreasing the operation of the larger S-9 pumps with the addition of the smaller S-9a pumps pumping seepage water back. P. B. 17-18.

The collection and drainage system within the C-11 drainage basin comports with the EPA's regulatory definition of "discharge of a pollutant," which *inter-alia* "includes additions of pollutants into waters of the United States from: *surface runoff which is collected or channeled by man;* discharges through *pipes, sewers, or other conveyances* owned by a State, municipality, or other person which *do not lead to a treatment works.*" (Emphasis added). 40 CFR 122.2

There is no provision in the CWA that states that nonpoint sources and point sources are completely separate.

The Structure of the CWA Point and Nonpoint Source Control: Balance Between Federal and State Responsibilities

The CWA is a paradigm of environmental regulation, and is an accepted exercise of federal power. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 282 (1981).

The Clean Water Act's principal objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. CWA §101(a), 33 U.S.C. §1251(a). In order to achieve this objective, Congress established the national goal that the discharge of pollutants into navigable waters be eliminated by 1985. CWA §101(a)(1), 33 U.S.C. §1251(a)(1). To achieve this objective, Congress made it unlawful to discharge any pollutant, (CWA §301, 33 U.S.C. §1311), through a point source unless in compliance with and NPDES permit under §402 of the CWA, 33 U.S.C. §1342.

Thus, Congress made it a federal requirement that all point source discharges of pollutants are to be governed by §402 of the CWA. A §402 permit requires the establishment and enforcement of technology based limits on individual discharges into navigable waters from point sources. CWA §§301, 304, 33 U.S.C. §§1311, 1314.

Under §402(b) NPDES permitting responsibilities may be shared with the state provided the state meets the requirements of the CWA under §402(b). The states are also required to set water quality standards which are the basis for determining discharge limits under an NPDES permit. EPA retains the right to withdraw the states' authorization to issue NPDES permits; and to veto a specific NPDES permit issued by a state. CWA §402(c), 33 U.S.C. §1342(c).

Florida was recently approved to administer the NPDES program by the Department of Environmental Protection. Fla. Stat. 403.088, under authority of EPA 40 CFR 122. Florida has established specific classifications for

each of its water bodies and water quality standards, at Fla. Admin. Code § 62-302.400.

All states, Florida included, have established water quality standards for the state, which are approved by EPA. CWA §303 (a), 33 U.S.C. § 303(a). 40 CFR Part 131. These water quality standards then form the basis for water quality based permit limitations for individual bodies of water. CWA §303, 33 U.S.C. §1313, 40 CFR §131.2. Section 303(d) requires each state to identify each water body in the state that fails to meet water quality standards, and to review NPDES permits to achieve those water quality standards. 33 U.S.C. §1313(d).

The Act also allows states to impose more stringent water quality controls. CWA §301(b)(1)(C), 33 U.S.C. §1311(b)(1)(C), (see also CWA §510, 33 U.S.C. §1370); see also 40 CFR §131.4(a)(1993). States are responsible for enforcing water quality standards on intrastate waters. CWA §309(a), 33 U.S.C. §1319(a).

States are also required to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. CWA §401, 33 U.S.C. §1341.

EPA's regulations implementing the CWA require that state water quality standards include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR §131.12 (1993).

The CWA reserved for the states the responsibility to deal with pollution through nonpoint sources. CWA §101(b), 33 U.S.C. §1251(b). The CWA does not define a nonpoint source, but the EPA and most courts and knowledgeable commentators have defined it as any discharge other than a point source, defined in the CWA §502(14), 33 U.S.C. §1362(14); 35 Santa Clara L. Rev. 1269, 1287-88 (1995). *Consumer Power*, 862 F.2d at 587.

The Petitioner Water Management District alleges that the Eleventh Circuit Decision in this case alters the

traditional federal-state balance of power by requiring that a state "diversion facility" must obtain a NPDES permit. (P.B. 21).

In support of its argument, the Petitioner relies on §101(g), which states that

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing waster resources.
>
> CWA §101(g), 33 .U.S.C. §1251(g).

Section 101(g) is not a prohibitive or limiting provision of the CWA. It does not say that if a state has a water allocation requirement or an established water use right that the Federal government cannot also require compliance with water quality for that discharge. In fact, that is the beauty of §101(g) – it recognizes and supports the dual nature of federal-state roles in water quantity and quality issues.

Sections 101(g) and 510(2) preserve the authority of each state to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. *PUD No.1 of Jefferson County et al. v. Washington Department of Ecology et al.* 511 U.S. 700, 720 (1994). This view is reinforced by the legislative history of the 1977 amendment to the Clean Water Act adding §101(g). (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978). "The requirements [of the

Act] may incidentally affect individual water rights...**It is not the purpose of this amendment to prohibit those incidental effects**. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations." (Emphasis added.) Id at 721.

Section 101(g) of the CWA was enacted in reaction to the 1972 Federal Clean Water Act. It came about mostly as a result of concern by the Western states of the effects of having to obtain a permit under Section 404 of the CWA, whenever a dam or a levee or an irrigation ditch was to be constructed. Hobbs & Raley, *Water Rights Protection and Water Quality Law; the 1977 Clean Water Act: An Exercise in Fundamental Federalism.* Univ. of Colorado Law Review, 1989.

The 101(g) Amendment, enacted with the 1977 Amendments, was the result of the cooperative effort of two prominent Western Senators, Senator Wallop of Wyoming, and Senator Hart of Colorado. The purpose and intent of section 101(g) is to protect state water rights creation and administration from "federal land use planning" while at the same time to allow "legitimate water quality measures" that may have some effect on the method of water usage." Hobbs and Raley, Univ. of Colorado Law Review, vol. 60, 1989 p.852, 853) (123 Cong. Rec. 39,211-212 (1977) (remarks of Sen. Wallop) reprinted in 3 Legislative History of the Clean Water Act, note 27 at 531-32. Id at 854.

The Eleventh Circuit Decision Facilitates the Traditional Federal-State Balance of Powers

The Eleventh Circuit Decision to require a NPDES permit under CWA §402 for the C-11 discharge into WCA-3A is an excellent example of how point and nonpoint source controls can work together to protect the Nation's waters.

When the District operates the S-9 pump to discharge from the C-11 **into the Everglades**, after the implementation

of the retention and best management practices within the Basin, and the water still contains pollutants, then the point source requirements of the CWA must take over, and the discharge must meet the water quality criteria of the State, at the point of discharge. EPA regulations require that NPDES permits must insure compliance with water quality requirements.[16] See 40 CFR §122.4(a), (d).

S-9 Permit Under the Everglades Forever Act

The S-9 permit, issued under the Everglades Forever Act, is a nonpoint source permit that requires development of strategies. Fla. Stat. §373.4592(10); J.A. 179 ¶¶ 4, 5. Developing strategies is not achieving compliance. This permit is not a permit to discharge from a point source based on water quality criteria. J.A. 194.

The Everglades Forever Act which Petitioner holds up as the State Water Quality Plan, recognizes that "the best available technology for achieving interim water quality goals" is a combination of Best Management Practices (BMPs) for agriculture and Stormwater Treatment Areas (STAs) to treat and remove the pollutants. Fla. Stat. §373.4592(1)(g). Under the Everglades Forever Act no treatment areas are proposed for the C-11 Basin discharge through the S-9. The S-9 pump station is part of a general permit under the Act, identified as the "Non-ECP" permit, meaning it is one of the many discharges that does not have a commitment for construction of a treatment plant. Fla. Stat.§ 373.4592(9)(k)and(i); See Consolidated Report at 8B-1 to 8B-20.

---

[16] Water quality standards are retained as a supplementary basis for effluent limitations, however, so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from fa!ling below acceptable levels.. CWA §§ 301(e), 302, 303, 33 U.S.C.§§ 1311(e), 1312 and 1313. *EPA v. California, ex. rel. State Water Resources Control Bd*, 426 U.S. 200, 205, n.12 (1976).

Subsequent to the filing of the Friend's and the Tribe's lawsuit the State and the Congress have approved the expenditure of over $124 million for the construction of a C-11 impoundment and Stormwater Treatment Area. WRDA 2000 §601(B)(2)(C)(v), 114 Stat. 2682.[17] EPA has required an NPDES permit for all the STAs that have been constructed and are discharging into WCAs 1, 2 and 3 under the Everglades Construction Project approved under the Everglades Forever Act. Fla. Stat. §373.4592(4)(a). EPA issued the first permit to the Water Management District for the discharge from what is now known as STA-1, discharging into the Loxahatchee Refuge (WCA-1) Permit No. SL-107[illegible]52. The State of Florida, after receiving authority to issue NPDES permits from EPA, issued two additional NPDES permits to the Petitioner Water Management District for discharging from two other STAs, STA-2, (NPDES Permit No.FL-01779461, issued Sept. 29, 2000.) and STA-5, Permit No. FL-0177954; and STA-6. An NPDES permit would be required for the proposed STA in the C-11 Basin as well.

The Petitioner Water Management District argues that the requirements of having to obtain an NPDES permit would "wreak havoc," mandating costly, burdensome bureaucratic proceedings to obtain permits, inviting litigation, and exposing agencies to huge penalties, as well as interfere with states' nonpoint source programs. P.B. 4. Everglades Restoration would allegedly suffer. P.B. 5.

The Petitioner Water Management District has been administering the NPDES permits cited above. These permits have not wreaked havoc, they have helped the

[17] In 1996, Congress directed the Corps, in cooperation with the District, to develop a comprehensive Everglades restoration plan. WRDA '96 § 528(b) The Restudy, completed in 1999, recommended the $8 billion Comprehensive Everglades Restoration Plan ("CERP"). CERP calls for numerous structural and operational changes to the C&SF Project in order to restore the quantity, quality, timing and distribution of water. Consolidated Report at 7A-3. P B.17. The new STA is a CERP Project.

District focus on obtaining compliance with the State's water quality standards at the point of discharge from the Everglades Agricultural Area into the Everglades. Now it has to be applied to the urban discharge from Broward County.

The 1972 Amendments of the CWA establish the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations. *EPA v. California State Water Resources Control Board, et al*, 426 U.S. 200, 205 (1975). As this Court stated, the NPDES permit:

> serves to transform generally applicable effluent limitations and other standards – including those based on water quality – into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. §§ 309 and 505, 33 U.S.C. §§ 1319 and 1365.
> Id at 205.

In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the (1972) Amendments. Id. at 205.

The Water Management District argues that since they have adequate nonpoint source control plans to deal with the pollution going into the Everglades, and that the S-9 pump station has a permit under state law, that the discharge from the S-9 should not be required to have a point source discharge permit (NPDES).

The problem with this argument is that a determination of whether a discharge is a point source to be regulated under CWA §402 cannot be based on the adequacy of the state's existing nonpoint program. The existence or nonexistence, the effectiveness or the non-effectiveness, of a state's nonpoint source plan has no relevance in the determination of whether a point source is a "discharge of pollutants" under the CWA. That evaluation is made by applying §301 and the definitions set out in §§ 502(6), (12),

and (14) of the CWA. 33 U.S. C. §§ 1311, 1362(6), (12), and (14).

Florida's Nonpoint Source Program for the Everglades has been Ineffective and Driven by Lawsuits for Failure to Implement a Sound Restoration

Petitioner SFWMD has diverse obligations under its enabling provisions. In 1972 the SFWMD became the local sponsor of the C&SF Project. Fla. Stat. §§373.016, 373.1501. P. B. 13. In addition to its duties to provide flood control and water supply to urban and agricultural interests it was given the additional responsibility of environmental protection and restoration. Fla. Stat. §§373.016, 373.1501; P.B. 13. These diverse responsibilities often create conflict which has led to three decades of intense wrangling among competing interests. P.B. 13.

It has been known since as early as 1939 that the Everglades was being severely damaged by reckless drainage, and that comprehensive water resource development, and the reversion of large areas to wetlands by "re-watering." was necessary. De Grove, Central and South Florida Flood Control Project 100-101 (1958) P.B. 7.

Between 1972 and 1988 little was done by Petitioner to stop the continuing degradation of the Everglades from the imposition of the C&SF Project and the discharge from the urban and agricultural areas into the Everglades.

As a result of the severe harm being experienced in the Everglades National Park and the Loxahatchee Refuge (WCA-1). in 1988 the Federal Government brought suit against the SFWMD in Federal Court for violating its commitment to bring clean water to these areas of the Everglades. *US v. SFWMD* No. 88-1886 (S.D. Fla.) This action resulted in a Settlement Agreement and eventual Consent Decree between the U.S. Department of Interior and the Petitioner, SFWMD in 1992. *Id.* As a result of that lawsuit, the programs laid out in the Everglades Protection

Act of 1991, resulting in the Water Management District's SWIM Plan of 1992 were begun.

Since that 1988 Lawsuit was filed the State Legislature passed two laws to try to deal with the deteriorating conditions in the Everglades. The first was in 1991, the "Marjory Stoneman Douglas Everglades Protection Act," Fla. Laws Ch 91-80; Fla.Stat. § 373.4592 (1991). Fla. Stat. §373.4592(g); J.A. 181-183. The Act identified the three Water Conservation areas, including WCA-3A, as part of the Everglades areas that needed protection and restoration, along with the Everglades National Park and the Florida Bay. The Act referred to these areas as the Everglades Protection Areas.

The 1993 Statement of Principles resulted from another lawsuit filed mostly by sugar cane growers, which challenged the 1991 Settlement Agreement from the 1988 lawsuit which was filed in Federal District Court in 1992. (P.B. 15).

The Statement of Principles then evolved into the Everglades Forever Act of 1994, Fla. Stat.§ 373.4592. P.B.15. To deal with the water quality problems identified in the Act the BMP set up a voluntary phosphorous reduction plan for the farms in the EAA, Fla. Stat. §373.4592, and established the creation of six large treatment marshes on the southern rim of the EAA to treat the water for phosphorous before being discharged into the Everglades WCAs. Burns & McDonnell, Everglades Protection Project Conceptual Design ES-2 (1994). (P.B.15). Each of these created marshes, called Stormwater Treatment Areas (STAs) by the Everglades Forever Act, was required to obtain a NPDES permit before discharging into the Everglades Fla. Stat. §373.4592(4)(a).

Also in the Everglades Forever Act, the legislature in effect suspended all water quality standards in the Everglades for a period of 12 years, in order to allow the Water Management District time to develop a numeric

standard for phosphorus. Fla. Stat. § 373.4592(4)(f)(3) [18] [19] That Act was recently amended by the Florida legislature to extend the suspension of water quality standards in the Everglades for at least another 10 years, until the year 2016. 373.4592 (2003)(3)(e).

The Everglades Forever Act also failed to include any means to treat discharge of polluted waters from the urban areas including the major discharge through the S-9 from Broward County into the Everglades. That is why the Friends of the Everglades and the Tribe brought this lawsuit against the Water Management District.

Section 402 Is not Limited to Permitting Industrial and Municipal Waste Streams

Petitioner Water District suggests that the definition of "pollutants" is itself a broad exemption provision, limiting the CWA's emphasis to "industrial and municipal" wastes. P. B. 28, 29. This assertion is specifically contradicted by the definition within the CWA of the term "pollutant." The definition, at CWA §502(6), states: "The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

---

[18] Both the Friends of the Everglades and the Tribe challenged this provision in lengthy litigation in both the District Court of Southern Florida and the Eleventh Circuit Court of Appeals. The litigation resulted in the Eleventh Circuit and subsequently the District Court determining that the statutory provision Fla.Stat.§ 373.4592(4)(f)(3) was a change in water quality standards by suspending those standards for a period of 12 years. *Miccosukee Tribe v. United States*, 1998 WL 1805539.

[19] When Marjory Stoneman Douglas learned that the Everglades Forever Act was going to suspend all water quality standards in the Everglades for at least 12 years, she and the Friends of the Everglades asked the State Legislature to remove her name from the act.

Section 502(14), which defines "point source," does not restrict the definition to industrial or municipal point sources, and, the definition of "discharge of pollutant" includes "any addition of any pollutant to any navigable waters from any point source," without a limitation to industrial or municipal discharges.

THE SOLICITOR GENERAL'S BRIEF

There is no way to reconcile the Solicitor General's Amicus Opinion with the CWA. The Solicitor General argues that any discharge from any navigable water to another is not a discharge of a pollutant.

The Solicitor General's opinion is based on the conclusion that, under the CWA, all navigable water bodies are the same, each is part of one entity identified as the Nation's navigable waters. Therefore, there is no discharge of pollutants from one water to another since the polluted water is already in navigable waters. Since there is no "discharge," the discharge between two navigable waters is a nonpoint source, and therefore the NPDES permit requirements of §402 do not apply.

The concept that all of our Nation's waters are the same from a water quality standpoint is unsupportable. The harm that results from treating all navigable waters as the same is clear when looking at impact of the polluted discharge from the C-11 stormwater Basin is causing when it is discharged into WCA-3A. One witness described it as a "monoculture of cattails" The native fish do not survive there, nor can the aquatic bugs that fish feed on be found there. J.A. 38-39.

The Solicitor General's Opinion would radically change the CWA distinction that a §402 permit must be obtained before a discharge can occur from <u>any</u> point source to navigable waters. This interpretation is contrary to this Court's determination that "Every point source discharge is prohibited unless covered by a permit, which directly

subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee v. Illinois* 451 U.S. 304, 318. (1975).

This "apparatus" includes the requirement that states establish water quality standards that must be specific to particular bodies of water, and must assign "designated uses" and water quality criteria for each water body, CWA §303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), and the basic protection of the NPDES permit to require compliance with water quality criteria at "the point where the discharge stream enters the waters of the United States." SG B.6; CWA §402, 33 U.S.C. §1342.

The SG opinion contravenes the fundamental overriding purpose of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA §101(a), 33 U.S.C. § 1251(a).

There is no question that the CWA reserves for the states the authority to move waters within the states for water allocation purposes or for compliance with state laws governing water use rights. CWA §304(f)(2)(F), 33 U.S.C. §1314(f)(2)(f). It is where the movement of that water becomes a discharge through a point source that adds pollutants from an outside source that causes the imposition of a §402 permit.

It is a "discharge" of a pollutant that distinguishes a point source from a nonpoint source. CWA §502(14) defines a point source as "any …discrete conveyance…from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Even a discrete conveyance is not a point source if there is no discharge of one of the pollutants listed within CWA §502(6), 33 U.S.C. §1362(6). A nonpoint source is understood as any source of pollution that cannot be traced to a point source. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156,164 (1982).

These basic tenets of the CWA are maintained under the Eleventh Circuit decision. They are undermined by the arguments of the Petitioner and the Solicitor General.

The Solicitor General suggests that since Congress has stepped in and developed the restoration through the CERP, that an NPDES permit is not necessary. SG. B. at 28. This argument ignores the fact that a legislative determination of the need for an NPDES permit is made under the CWA, §§301, 402 and 502(12) and (14); not on whether there is an effective nonpoint source control plan in effect.

Further, the water flow restoration of the CERP Plan is based on the assumption that the Florida DEP will be meeting water quality and permit standards by 2006. §601(b)(2)(a)(II)(ii), 114 Stat. 2681. However, the Florida legislature recently amended the water quality compliance statute, the Everglades Forever Act, to extend the suspension of water quality standards in the Everglades for at least another 10 years, until the year 2016. Fla. Stat. §373.4592(3)(e), (2003).

IMPACT OF ELEVENTH CIRCUIT DECISION

The Eleventh Circuit Decision does not impact on many of the Amicus concerns. The Decision does not conflict with the EPA exemption for dam-caused pollution within a single water body. If there are inter-basin transfers, as the Commonwealth of Pennsylvania Amicus Brief clearly establishes, an NPDES permit will not "wreak havoc," either on dischargers or the state. Instead, it will protect our Nation's waters when discharges from one navigable body of water to another adds pollutants that could cause harm.

CONCLUSION

The Judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

John E. Childe
Counsel for Respondent
Friends of the Everglades